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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 304

PAPER CONTAINER MFG. COMPANY,
Petitioner,

vs.

DIXIE CUP COMPANY,
Respondent.

BRIEF OPPOSING PETITION FOR CERTIORARI.

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After two appeals of this case, the District Court entered its final judgment which contained the following determination of costs and attorney fees (Rec. 68):

> "14. That, except as hereinbefore provided [having allowed to petitioner $902.65 costs of prior appeals], the respective parties shall bear, without recovery from the other, all such sums as they may have expended or become liable for for attorneys' fees, master's fees, court reporters' fees, or other costs and expenses of litigation."

Petitioner appealed again, *solely* from that determination of costs and attorney fees. Every other provision of the final judgment had been finally adjudicated in prior appeals. The Court of Appeals affirmed the District Court's determination of costs and attorney fees, 174 F. (2d) 834 (Rec. 88-93).

The petitioner now asks the Supreme Court to review the Court of Appeals' review of the District Court's determination of costs and attorney fees.

It is not claimed that the District Court in making that determination or the Court of Appeals in its review thereof misconceived or misapplied any principle of law. Indeed, the law respecting costs including attorney fees was stated by the Court of Appeals in 169 F. (2d) 645 as petitioner has contended, and was so applied by the District Court in its final judgment and was so applied by the Court of Appeals in reviewing the District Court's determination. The petition merely argues facts and asks the Supreme Court to re-determine the costs and attorney fees.

Even if the Supreme Court were to consider hearing such a re-argument of the facts, the petitioner has brought to this Court only a short record and has left in the Court of Appeals the full record of facts upon which the judgments of the District Court and of the Court of Appeals were based. The petitioner not only asks the Supreme Court upon a printed record to review, solely upon the facts, a District Court's determination of costs and attorney fees[1] already reviewed and affirmed by the Court of Appeals; the petitioner does not even supply the full fact record to be reviewed.

---

1. Attorney fees, when allowable, have been held to constitute costs. *Sprague* v. *Ticonic Bank*, 307 U. S. 161, 164; *Official Aviation Guide Co.* v. *American Av. Assoc.*, 162 F. (2d) 541, 543 (CA-7); *Sales Affiliates* v. *National Mineral Co.*, 172 F. (2d) 608, 613 (CA-7).

Going back even to the days of direct appeals to this court it has never been the practice of the Supreme Court to entertain appeals merely from allowance or denial of costs. *Elastic Fabrics Co.* v. *Smith*, 100 U. S. 110, 112; *Wood* v. *Weimar*, 104 U. S. 786, 792; *Trustees* v. *Greenough*, 105 U. S. 527, 537; *Stuart* v. *Boulware*, 133 U. S. 78, 82; *Burns* v. *Rosenstein*, 135 U. S. 449, 456; *City Bank* v. *Hunter*, 152 U. S. 512, 516; *DuBois* v. *Kirk*, 158 U. S. 58, 67; *Wingert* v. *First National Bank*, 223 U. S. 670, 672; *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 83.

Summary of the Litigation.

43 F. Supp. 518. The District Court found infringement of seven claims of the Smith and Bild patent, of five claims of the Barbieri patent, of ten claims of the Amberg patent, and of two claims of the Holman patent.

The court's statement of the circumstances surrounding the Smith and Bild patent and its infringement tended to indicate infringement of a wilful and flagrant character.

130 F. (2d) 569. The Court of Appeals affirmed all findings respecting the Smith & Bild patent but did not sustain the findings respecting the other patents.

317 U. S. 686, 713. Apparently because the probability of future trebling of damages was indicated, the present petitioner then filed in this court a petition for certiorari. It was denied. A petition for re-hearing was filed. It was denied.

Upon that petition for certiorari, the complete record to that date was presented to the Supreme Court.

Judgment of the District Court upon the accounting and the record upon the accounting. Except as appears in 169 F. (2d) 645, in 174 F. (2d) 834, and in the argument before the District Court upon costs and attorney fees, there is presently before this court no record of the District Court judgment then entered upon the accounting and no record of the accounting. It is primarily upon that missing record that the petitioner attempts to base its argument.

169 F. (2d) 645. After the accounting, the District Court had entered judgment against the petitioner for damages (trebled) of $2,096,062.23, for attorney fees of $71,163.50 and for other costs of $3,141.61. In addition to the machines held to infringe during the period prior to the institution of suit, the District Court had held that

subsequent changes in machines had not removed the infringement. The accounting for all the machines had shown huge profits by the petitioner.

Upon the doctrine of file wrapper estoppel, the Court of Appeals reversed the judgment of the District Court, so far only as the District Court had held the new machines to infringe. The accounting was to be limited to the old machines.

In that opinion, the Court of Appeals stated the law applicable to costs and attorney fees as follows (651):

> "Plaintiff was awarded attorney fees in the amount of $71,163.50. Defendant's claim for attorney fees in the amount of $70,000 was denied.[1] Each of the parties claimed attorney fees on the theory that it was the prevailing party in the litigation. Title 35 U. S. C. A. Sec. 70 provides: 'The court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case.' Here again, we must recognize the rule that the apportionment of costs and the allowance of attorney fees is a matter largely in the discretion of the lower court. *General Tire and Rubber Co.* v. *Fisk Rubber Corp.*, 6 Cir., 104 F. 2d 740, 748; *Perrine, et al.* v. *Burdick, et al.*, 8 Cir., 138 F. 2d 861, 866. Our chief difficulty in determining whether there has been an abuse of discretion arises from the fact that the record is silent as to the basis upon which the Master recommended attorney fees for the plaintiff and denied such fees to the defendant. It appears, however, that it was on the theory that plaintiff was the prevailing and defendant the losing party. If so, we think this was an erroneous premise. * * *
>
> "Whether either party is entitled to an award of attorney fees under the circumstances of the case we express no opinion."

Final judgment of the District Court (Rec. 67-9). Re-

1. There is no explanation how that claim of $70,000 has now grown to $200,000 (petition page 1).

specting costs and attorney fees, the District Court rescinded its previous allowance to respondent of attorney fees of $71,163.50 and of other costs amounting to $3,141.61 and inserted in the judgment the paragraph 14 (quoted at the beginning of this answer) which awarded attorney fees and costs to *neither* party (with the exception stated in that paragraph 14).

174 F. (2d) 834. Upon appeal, the Court of Appeals affirmed the District Court's determination of costs and attorney fees.

The Petitioner Was Found to Be a Wilful Infringer.

The petition for certiorari wholly omits to state a very significant fact. The final judgment found the petitioner to be a wilful infringer. That finding is not challenged. It cannot be challenged at this stage of litigation. We quote from the final judgment of the District Court (Rec. 67-8):

> "7. That the Defendant and its alter ego, Leo J. Hulseman, after misappropriating the invention of the Smith and Bild patent while the application therefor was pending and was secret, tried to misappropriate the patent monopoly therefor and toward that end did, on August 12, 1938, file an application for United States Letters Patent, in which application they sought the allowance of claims to dominate the invention of the then pending Smith and Bild application for patent; and in connection therewith, Leo J. Hulseman falsely swore that he believed himself to be the first and original inventor of said invention and that the same was not in public use or on sale before his alleged invention, or more than two years before his said application was filed.
>
> "8. That the Defendant and its alter ego, Leo J. Hulseman, wrongfully and deliberately appropriated the invention defined in claims 9, 10, 23, and 24 of the Smith and Bild patent in suit some time in April, 1936, over four years before the Smith and Bild patent

No. 2,203,510 issued, and while the application therefor was pending and was secret.

"9. That under the circumstances of this case the general damages, as found, should be trebled, and the damages assessed herein are hereby increased three times their amount and the Plaintiff is entitled to recover the same.

"10. That the general damages caused to plaintiff by defendant's aforesaid infringement is the sum of $51,342.39.

* * * * *

"12. That three times the general damages, in the sum of $51,342.39 is the sum of $154,027.17, and, accordingly, the plaintiff is entitled to recover from the defendant said sum of $154,027.17, less the aforesaid sum of $902.65, or the net sum of $153,124.52."

The petitioner presents no decision in which a court has held an infringement to be wilful and accordingly has trebled the damages, and in which the court at the same time saw fit to reward the wilful infringer by requiring the injured party to pay the wilful infringer's attorney fees. If a chancellor were disposed to lessen the financial burden suffered by a wilful infringer as a result of his infringement, the chancellor would normally charge the infringer only with the damages, without trebling them, before he would give any consideration to requiring the injured party to pay the wilful infringer's attorney fees.

The Applicable Law.

The Act of August 1, 1946 (35 U. S. C. 70):

"* * * upon a judgment being rendered in any case for an infringement the complainant shall be entitled to recover general damages * * * together with such costs, and interest, as may be fixed by the court. The court *may in its discretion* award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case." (Italics ours.)

Senate Report, March 5, 1946, 79th Congress, 2nd Session:

> "* * * The provision relating to attorney's fees is made discretionary with the court. It is not contemplated that the recovery of attorney's fees will become an ordinary thing in patent suits * * *."

We referred above to the opinion of the Court of Appeals, 169 F. (2d) 645, which quoted, " 'The court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment in any patent case,' " and added, "Here, again, we must recognize the rule that the apportionment of costs and the allowance of attorney fees is a matter largely in the discretion of the lower court."

The later opinion of the same court, 174 F. (2d) 834, 837 expressed it as follows:

> "Our decision as to the proper scope of our power of review in this respect is, we think, in line with those in other cases * * *. We believe that to justify a finding of abuse of discretion it is necessary to show that the order complained of was based upon an erroneous conception of the law or was due to the caprice of the presiding judge or to action on his part arbitrary in character. We find no such circumstances here."

This court in *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78, 83, clearly stated the reason for reluctance to review findings upon costs:

> "The rule forbidding appeals from decrees for costs only is easily deducible from the discretion vested in the trial court in fixing them and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case. When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed."

Other cases regarding review of determination of costs,

including attorney fees, are: *Sales Affiliates* v. *National Mineral Co.*, 172 F. (2d) 608, 613 (CA-7); *Blanc* v. *Spartan Tool Co.*, 168 F. (2d) 296, 300 (CA-7); *In re 32-36 North State St. Building Corp.*, 164 F. (2d) 205, 207 (CA-7); *In re Mt. Forest Fur Farms*, 157 F. (2d) 640, 649 (CA-6); *Gochenour* v. *Cleveland Terminals Building Co.*, 142 F. (2d) 991, 995 (CA-6); *In re Seville Court Apartments Buildings Corp.*, 134 F. (2d) 232, 233 (CA-7); *Lackner* v. *Illinois Bell Telephone Co.*, 111 F. (2d) 136, 139 (CA-7); *In re Herz*, 81 F. (2d) 511, 512 (CA-7).

Even a clearly prevailing party has been fairly denied attorney fees in a case which was hard, close, and fought in good faith (*Official Aviation Guide Co.* v. *American Av. Assoc.*, 162 F. (2d) 541, 543 (CA-7), and in a case in which the controlling principle of law was new and not generally recognized (*Lincoln Electric Co.* v. *Linde Air Products Co.*, 74 F. Supp. 293, 294), and in a case in which the award asked by the defendant was contrary to established practice (*National Brass Co.* v. *Michigan Hardware Co.*, 75 F. Supp. 140, 141), and in a case which involved an unnecessary amount of "feuding" (*Jerome* v. *Twentieth Century-Fox*, 71 F. Supp. 914, 915). There is scarcely any field in the law in which so many factors of equity and common sense (*Marks* v. *Leo Feist, Inc.*, 3 F. (2d) 460, 461 (CA-2)) may properly enter as in the determination of allowance of attorney fees. Peculiarly is the allowance of attorney fees within the discretion of the judge who has presided over the case.

The vesting of discretion in the trial court for the allowance of fees and other costs is not new in the Act of August 1, 1946. Such has always been the rule.

In the present case, the final judgment now complained of rescinded $71,163.50, attorney fees previously allowed to the respondent, and made allowances to *neither* party. The respondent was the ultimately prevailing party, who

recovered $153,124.52. Assuming that to some extent in the litigation the petitioner was also a prevailing party (petitioner so argued and the Court of Appeals so held), nevertheless the petitioner was a wilful infringer and except for the wilful infringement the litigation would never have occurred. Under such circumstances, it was certainly fair, at least to the petitioner, that there be no allowances to either party. The Court of Appeals, reviewing the record *for the third time,* affirmed the District Court.

Petitioner's Points.

(1) The petitioner charges abuse of process because the infringement suit was filed upon "fourteen patents" whereas the petition recites (page 3) "before trial, charges were voluntarily dropped as to all but four patents and twenty-six claims."

A more precise statement of the facts is as follows: suit was filed February 11, 1939 (Prior Rec. 2)[1]; a bill of particulars was ordered March 6, 1939 (Prior Rec. 5); after contests over discovery, respondent obtained inspection in the fall of 1939 (Prior Rec. 23); thereafter respondent withdrew several claims and added three patents; later in 1940, in order to simplify the issues and because of the early expiration of certain patents, plaintiff withdrew six patents and various claims (Prior Rec. 99). So the suit remained. Not until October 24, 1941 did the case go to trial (Prior Rec. 100). The result of the trial was 43 F. Supp. 518.

The facts do not support the conclusion that in pursuing the infringer whose infringement was wilful and flagrant the injured party abused judicial process. Such was not the conception of the District judge who presided at the many hearings of this case in his court. Such was not the

1. The reference is to the prior record before this Court, 317 U. S. 686, 713.

conception of the Court of Appeals, which in passing upon this argument said at 174 F. (2d) 834, 836, Rec. 90:

> "This court has previously held that plaintiff had a valid patent; that defendant had infringed; that the circumstances of that infringement were such as to aggravate the tort, and that, as a result, plaintiff was entitled to recover treble damages as provided by statute. It is urged that plaintiff presented an unreasonable number of patents and claims in its original complaint, thus imposing unnecessary labor upon defendant's counsel; but most of these were eliminated by the bill of particulars, and not an unprecedented number of patents, when we consider patent litigation in its general aspects, was involved in the trial. At any rate, we think that these facts were proper to be considered by the District Court and that refusal of the court to decide because of them justifies no finding of abuse of discretion. All but four claims of one patent were eventually eliminated but these were held valid and their infringement of such character as to make of defendant's tort an aggravated offense."

(2) The petitioner complains that when, after 130 F. (2d) 569, the case was referred to the master for an accounting, the respondent then claimed that machines not previously involved in the litigation also infringed.

It can scarcely be seriously argued that the petitioner was free to avoid the injunction at will by colorable change in its machines. If such be the contention, we refer to the following decisions in which, precisely as in this case, the new machines were brought into the suit with respect to which the accounting was proceeding. *Metzger & Co.* v. *Barber, et al.*, 194 Fed. 426 (CA-2); *Flat Slab Patents Co.* v. *Turner*, 285 Fed. 257 (CA-8); *Hartford Engine Co.* v. *Obear-Nestor Glass Co.*, 95 F. (2d) 414 (CA-8); *A. B. Dick Co.* v. *Marr*, 48 F. Supp. 775 (S. D., N. Y.), 155 F. (2d) 923 (CA-2); *Fauber* v. *United States*, 81 F. Supp. 218 (Ct. Cl.), certiorari denied, 69 S. C. 1048, 93 L. Ed. 897.

Indeed, *Metzger & Co.* v. *Barber, et al.*, 194 Fed. 426 (CA-2) and *Hartford Engine Co.* v. *Obear-Nestor Glass Co.*, 95 F. (2d) 414 (CA-8) each approve the initial procedure adopted by respondent to bring in the new machines and to determine the issue of infringement, to-wit, to cite for contempt.

(3) The petitioner flamboyantly asserts (page 16):

> "The present case displays clearly the adverse effect on competition incident to misuse of the judicial process * * *. When the scope of the patent was finally defined in the first Court of Appeals decision, Respondent changed its tactics and insisted on a new patent infringement charge. * * * ultimately forced Petitioner to go through a complete accounting before its defense of no infringement * * * was vindicated * * *."

Those assertions relate to the record which is not here in its entirety.

The Court of Appeals, however, had the full record before it and in 174 F. (2d) 834, at 835, stated:

> "Subsequently, before the Master to whom the District Court referred the matter, plaintiff sought to include in its recovery damages for alleged infringement by two later machines manufactured by defendant, asserting that it had only recently discovered the newly alleged infringing devices. Thereupon defendant applied to the District Court for a declaratory judgment adjudging that its additional machines did not infringe and asked the court so to decide before continuing with the accounting. Plaintiff objected, but at the same time likewise endeavored to obtain a decision as to whether the new machines which plaintiff had complained infringed, before the Master proceeded, by a motion that defendant be declared in contempt of the existing judgment declaring it an infringer. Obviously, the court might, by either of these methods, have determined preliminarily to the account-

ing, whether the two machines which had been brought into the case after entry of the decree infringed.[1] However, the court, presumably because of the multiplicity and volume of litigation arising in the District Court in a great metropolis and the consequent pressure upon the court, thought that the most practical procedure was to let the Master hear the entire matter on the accounting each party reserving, of course, its contentions as to infringement or non-infringement by these two machines, until final hearing on the merits."

We quote also from the petition, page 4:

"The matters of the petition and motion came before the District Court on April 21, 1943. He referred the entire matter to the master."

We note, particularly, that there is not even a claim by the petitioner that it objected to the reference.

We quote from our Court of Appeals brief, page 25:

"The defendant made no objection to the reference of the issue to the Master. It is difficult to conceive upon what theory the defendant, who had no objection then, can plausibly now complain of that reference. *Coyner* v. *U. S.*, 103 F. (2d) 629 (CA-7) * * *

"We may merely speculate as to the reason why the defendant did not insist upon immediate adjudication of the issue of infringement at that time. However, it is a fair surmise that the defendant was not too sure of distinction between the machines and wished much more preparation and wished the record first to

1. At page 4 of the petition, we find the following statement: "In the motion to punish, Respondent asserted that Petitioner could not contest the question of infringement (Rec. 24, 88-89)."

Examining Rec. 24 it will be found that there is nothing whatever to support the statement. As to Rec. 88-89, the reference is to the same quotation of the Court of Appeals opinion from which we quote, and the opinion contains nothing whatever to support the statement. Obviously, a petition to cite for contempt raised the issue of infringement. *Metzger & Co.* v. *Barber, et al.*, 194 Fed. 426 (CA-2); *Hartford Engine Co.* v. *Obear-Nestor Glass Co.*, 95 F. (2d) 414 (CA-8).

contain the 750 pages (T. R. 1030-1780)[2] of testimony of its expert witness who was not in fact produced for a considerable period of time."

Indeed, the Master did actually pass upon the issue of infringement first, as clearly appears from the petition, page 4:

> "On November 27, 1944, the master filed a draft report. In this report he recommended an injunction and an order of accounting with respect to the additional machines. However, he did not propose to proceed with an accounting as to these machines until the matter of infringement was settled by the District Court."

The short record shows that the District Court on January 15, 1945 made the following statement respecting the procedure upon the two later machines (Rec. 51):

> "I don't want it coming up piecemeal. I want the whole matter to come up. For instance, if somebody contends that a certain machine is covered by the patent and the other side contends it is not, we will take the accounting on the basis that it is and the accounting on the basis that it is not, and then the whole thing will be before me and will be before any reviewing court. I want all the questions decided and with a report covering the whole thing, and I want that with all convenient speed. I don't want the case coming up in piecemeal."

The petitioner assumes, without demonstrating, that that order then entered by the District Court was erroneous. The case cited by the petitioner does not involve facts at all comparable. The District Court had previously conducted a long hearing upon the issue of infringement, 43 F. Supp. 518, which had been reviewed by the Court of Appeals, 130 F. (2d) 569. If the Court's desire to avoid further piecemeal hearings was deemed to impose hardship upon either party the party should have said so.

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2. The reference is to the missing record.

The petitioner *now* charges, as we read its petition, that the respondent "abused judicial process," and engaged in "indiscreet and malevolent assertion of patent rights," etc., etc., by proceeding under that order. If any part of petitioner's extravagant language were justified, we wonder why the petitioner did not make some effort at the time to rectify the situation, or if it were unable to do so why it did not seek a writ of mandamus, for it certainly has shown no reluctance to litigate until the final bell rings.

We have always assumed that one was not subject to a suit for malicious prosecution or to a charge of pursuit of groundless action or to a charge of malevolent conduct when he followed, or was supported by, an order or judgment of the United States District Court duly entered after notice and hearing. Throughout its petition, the petitioner wholly fails to make any distinction between an action or complaint unsupported by judicial finding and judgment and an action or complaint supported by such judicial finding and judgment.

Who is to blame for expense and trouble caused by an error of the District Court or by a failure of the Court of Appeals and the District Court to agree, however one may express it? Since the date of the *Squib* case, we would assume that the infringer, whose wilful and flagrant infringement made the litigation unavoidable has the real responsibility.

(4) The petition at page 16 and elsewhere contains the assertion that "respondent knew of the newly accused machines before the first trial." There is, of course, no record reference, and we are at a loss to comprehend why such an unsupported statement should be made, when as a result of the briefs in the Court of Appeals (in which we devoted several pages to petitioner's charge) it is well known that respondent's answer is a categorical denial.

We also note upon page 11 and elsewhere in the petition the unspecified and thinly-veiled charge of fraud, the quoted language being "* * * a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud."

With reference to such assertions, thus unfairly made in the absence of any record, we can only deny categorically and refer to the fact that neither the District Court nor the Court of Appeals so found.

(5) As a further phase of the same argument, the petitioner at page 9 and elsewhere complains that the Master compelled it to itemize certain schedules of sales and purchases. Again there is no record reference, for there is no record, and there is not even a suggestion that any objection thereto was made to the Court.

It is obvious that at that time the respondent was entitled to recover profits. In computing profits, the respondent was entitled to reject all sales made at a loss. *Duplate Corp.* v. *Triplex Co.*, 298 U. S. 448, 458. In order to reject sales made at a loss, a detailed statement of sales was relevant. The reason therefor was stated at Rec. 53.

The trial lawyer who spoke for the petitioner in the accounting died several years ago, as did the trial lawyer who spoke for the respondent in the accounting (Rec. 24). Particularly when brief-writing lawyers get into dispute about a record of that accounting not even brought to this court, we suggest that the most authoritative sources of information are, first, the District Court before whom it all transpired, and, second, the Court of Appeals which painstakingly has reviewed the case *three times.*

Accordingly, we quote what the Court of Appeals says about petitioner's arguments to which we have just referred, Rec. 91, 174 F. (2d) 834, 837:

> "A zealously contested question, presented by able counsel on both sides, is whether the action of plain-

tiff in bringing before the Master in the accounting, new machines manufactured by defendant which it alleged and which the court found likewise infringed the four claims previously sustained and the expensive accounting necessitated by such injection, required an allowance to defendant. Defendant points with emphasis to the fact that this court reversed a very substantial judgment granted plaintiff in the District Court in that regard. But, as we have suggested, plaintiff did contend before the Master and the District Court that these two machines infringed. The Master so found. The District Court agreed, and this court reversed because it held that the defense of estoppel of plaintiff to assert infringement was a complete answer to the charge. In view of the fact that both the Master and the court found infringement, we hardly believe the circumstance that plaintiff brought in to the case something which we later held could not be considered because of estoppel, is sufficient to impeach the good faith of plaintiff in prosecuting its accounting before the Master or that this circumstance was sufficient in itself to impose upon the District Court, in the exercise of its discretion, a duty to allow to defendant counsel fees and costs because of the injection of that additional feature into the accounting. There are assertions of unfair tactics upon the part of each of the litigants, and it may be true that the accounting could have been much more speedily and economically disposed of had a different method been employed to settle the question of infringement by the additional machines brought in, but, again, the procedure followed by the District Court was, we think, within its sound discretion. Undoubtedly defendant incurred tremendous expense in preparing its figures as to these additional machines and a great amount of time and money was expended over a period of five years in completing the entire accounting, and, in the end, defendant prevailed, as to these two machines. On the other hand, plaintiff prevailed upon its original judgment as to machines involved in the original trial. After review

of the precedents and consideration of the facts, it is our conclusion that we are not justified, under the particular facts and circumstances of this case, in saying that the District Court, endowed with nine years' familiarity with the case, the evidence, the litigants and the witnesses, abused its discretion when it decided that neither party was entitled to recover attorneys' fees and costs."

In conclusion, we respectfully submit:

1. That, under all the circumstances, the disallowance of costs and of attorney fees to either side was fair; at least, it was entirely fair to the wilful infringer.

2. That no valid reason whatever is suggested for the Supreme Court to review the taxing of costs which was properly performed by the District Court and which has already been reviewed by the Court of Appeals. There was no abuse of discretion.

The litigation should finally now be terminated.

Respectfully submitted,

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DENIED